

## EXHIBIT 7

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RICHMOND COUNTY, GA.

IN THE SUPERIOR COURT OF RICHMOND COUNTY  
STATE OF GEORGIA

MATTISON R. VERDERY, C.P.A.,  
P.C., individually and on behalf of all  
persons and entities similarly situated,

Plaintiffs,

v.

STAPLES, INC., and QUICK LINK  
INFORMATION SERVICES, INC.,

Defendants.

CIVIL ACTION FILE  
NO. 2003-RCCV-728

**REPLY BRIEF OF DEFENDANTS**  
**STAPLES, INC. AND QUICK LINK INFORMATION SERVICES, LLC**  
**IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND**  
**IN RESPONSE TO PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT**

NOW COME Staples, Inc. ("Staples") and Quick Link Information Services, LLC  
("Quick Link"), Defendants in the above-styled case, and show as follows:

**ARGUMENT AND CITATION OF AUTHORITY**

Plaintiff seeks a legal and financial windfall from this Court – namely, the repudiation of a long line of dispositive regulatory-agency rulings, and the imposition of retroactive liability, on a class wide basis for millions, if not billions of dollars in statutory damages. Plaintiff's Complaint is at odds not only with the agency's clear exemption of "established business relationships" from the prohibition on "unsolicited" facsimile advertisements, but also with the reported decisions of several courts (cited in Defendants' original brief) and with basic notions of fairness and due process. Indeed, Plaintiff's overreaching prayer for "relief" from

ignores the fact that this Court lacks subject matter jurisdiction to overrule the FCC's consistent Orders and rulings under the TCPA.

Plaintiff contends that it received an "unsolicited" facsimile advertisement from Staples in violation of the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227 ("TCPA"). Plaintiff admits, however, that it regularly did business with Staples and that it gave its facsimile number to Staples during the course of its transactions with Staples. See, e.g., [Verdery Depo., Tr. pp. 7:13 to 7:21, 8:6 to 8:17, 12:14 to 13:18, 14:9 to 17:25, 22:16 to 22:22, 24:15 to 24:20].

**A. The FCC has repeatedly and consistently held for the last eleven-plus years that an established business relationship establishes "prior express invitation or permission" to receive facsimile advertisements under the TCPA.**

Pursuant to the Reports and Orders and other regulatory guidance issued by the FCC over the last eleven-plus years, Plaintiff's provision of its facsimile number *in the context of its ongoing business relationship with Staples* satisfies the TCPA's requirement of "prior express invitation or permission." The FCC had the authority to interpret the TCPA in this manner pursuant to the rulemaking authority specifically conferred upon it by the TCPA and the Telecommunications Act of 1934 (of which the TCPA is a part).

The TCPA regulates both facsimile advertising and telephone advertising. As explained in Defendants' initial brief, the statute grew out of separate bills dealing with facsimile advertising and telephone advertising, respectively. As passed, the TCPA bans the transmission of "unsolicited advertisements" to telephone facsimile machines. 47 U.S.C. § 227(b)(1)(C). An "unsolicited advertisement" is defined as "any material advertising the

commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission." 47 U.S.C. § 227(a)(4).

The terms "prior express invitation or permission" are nowhere defined in the TCPA. At a 1989 Congressional hearing on the TCPA, law professor and constitutional scholar Robert L. Ellis of Indiana University noted the "problematic" nature of these terms:

**One of the core phrases used by H.R. 2184 is "unsolicited advertisement," which is defined as "any material advertising the commercial availability of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission." This definition is problematic for several reasons. First, it begs the question of what "unsolicited" means. When, for example, does a prior business contact constitute "express invitation or permission"?**

*Telemarketing Practices, Hearing before the Subcommittee on Telecommunications and Finance, Serial No. 101-43, May 24, 1989, at pp. 45, 63 (Dr. Ellis noted in the first footnote that he was not affiliated with the facsimile industry in any way). Instead of clarifying these terms, the House Committee on Energy and Commerce noted that it purposely did not define the words "express invitation or permission":*

**The Committee did not attempt to define precisely the form in which express permission or invitation must be given, but did not see a compelling need for such consent to be in written form.**

House Report 102-317, November 15, 1991, at p. 13. The Committee did make it clear, however, that it did not intend to unduly interfere with established business relationships:

**The bill reflects ... a desire to not unduly interfere with ongoing business relationships.**

House Report, 102-317, at pp. 13, 17. Moreover, Congress acknowledged time and again that the proposed legislation was not meant to prohibit businesses from contacting their customers.<sup>1</sup> Ultimately, the President signed the bill into law because it gave the FCC "ample authority to preserve legitimate business practices." Statement by the President upon signing the TCPA into law, December 20, 1991, cited in the 1992 FCC Report, 7 FCC RCD 8752, n. 1.

Since 1992, in accordance with the aforementioned legislative intent, the FCC has interpreted the TCPA to provide that the existence of an established business relationship between a facsimile recipient and a facsimile sender establishes "prior express invitation or permission" as to the receipt of facsimile advertisements. The position that an "established business relationship" supplies consent is not the accidental offshoot of a solitary FCC ruling, as Plaintiff would have this Court believe, but rather a sturdy regulatory framework tracing its roots to no fewer than seven FCC orders, position statements, and other pronouncements during the 1992-2003 timeframe:

- **FCC Report and Order**, 7 FCC Rcd 8752, 8779, CC Docket No. 92-90, FCC 92-443, para. 54, n. 87 (September 17, 1992) ("[F]acsimile transmission from persons or entities who have an established business relationship with the recipient can be deemed to be invited or permitted by the recipient. See para. 34, *supra*."); *id.* at para. 34 ("[T]he legislative history indicates that the TCPA does not intend to unduly interfere with ongoing business relationships.").

<sup>1</sup> E.g., Congressional Record, November 7, 1991, S. 16204 (sponsors of the TCPA, at a time when there was no established business relationship exception anywhere within the TCPA, noted that the TCPA would not prohibit contacts between businesses and their customers: "[MR. PRESSLER]: This bill will not prohibit businesses from contacting their established customers. ... We have directed the FCC to further define the rules and regulation [sic] needed to allow businesses to contact customers who expected to receive calls from companies they do business with. The purpose of the substitute [bill] is to prohibit cold calls by any telemarketer to the telephone of a consumer who has no connection or affiliation with that business and who has affirmatively taken action to prevent such calls. ... [MR. GORE]: ... Nevertheless, is it not true that the FCC may consider establishing different rules concerning calls made by businesses to their prior or existing customers? [MR. PRESSLER]: Yes, that is correct.").

- **FCC Report and Order**, 10 FCC Rcd 12391, 12408, CC Docket No. 92-90, F.C.C. Release No. 95-310, para. 37 (August 7, 1995), ("The [1992] Report and Order makes clear that the existence of an established business relationship establishes consent to receive telephone facsimile advertisement transmissions.").
- **FCC Public Notice**, 16 FCC Rcd 4524, "FCC Reminds Consumers About 'Junk Fax' Prohibition," at 1 (February 20, 2001) ("An established business relationship, however, demonstrates consent to receive fax advertisement transmissions.") (citing 1995 FCC Report and Order).
- **"Unwanted Faxes: What You Can Do" webpage** from the FCC website, at 1 (June 6, 2003) ("If, however, you have an 'established business relationship' with a person or entity then, in effect, you've given your consent to receive unsolicited faxes from that person or entity.").
- **FCC Report and Order**, 18 FCC Rcd 14014 at ¶ 189 n. 699 (July 3, 2003) ("We emphasize that, prior to the effectuation of rules contained herein, companies that transmitted facsimile advertisements to customers with whom they had established business relationships were in compliance with the Commission's existing rules.").
- **FCC Order on Reconsideration**, 18 FCC Rcd 16972 at ¶ 5, n.24, and ¶ 6 (Aug. 18, 2003) ("Under [our existing TCPA] rules, those transmitting facsimile advertisements must have an established business relationship or prior express permission from the facsimile recipient to comply with our rules. . . . [U]ntil . . . January 1, 2005, an established business relationship will continue to be sufficient to show that an individual or business has given express permission to receive facsimile advertisements.").
- **FCC Press Release**, at 1 (Aug. 19, 2003) ("The extension keeps in effect, until January 1, 2005, the exemption that allows entities to send unsolicited fax advertisements to individuals and businesses with which they have established business relationships. Until January 1, 2005, those transmitting faxes do not have to obtain the express written consent, including signatures, from recipients with whom they have established business relationships.") (emphasis in original).

The above "Report[s] and Order[s]" serve as the cornerstones of the FCC's position. These Reports and Orders, being longstanding rules of the FCC, are owed "particular deference." See Barnhart v. Walton, 535 U.S. 212, 218-20 (2002) ("If ... the statute 'is silent or ambiguous with respect to the specific issue,' we must sustain the Agency's interpretation if it is 'based on a permissible construction' of the Act. [Cit.] ... The interpretation makes

considerable sense in terms of the statute's basic objectives. ... *And this Court will normally accord particular deference to an agency interpretation of 'longstanding' duration.* [T]he fact that the Agency previously reached its interpretation through means less formal than 'notice and comment' rulemaking, see 5 U.S.C. § 553, does not automatically deprive that interpretation of the judicial deference otherwise its due." (emphasis and italic added)).<sup>2</sup>

Even if this Court were inclined to believe that the FCC's longstanding interpretation of the TCPA is incorrect, the Supreme Court has repeatedly emphasized that "a court is not to substitute its judgment for that of the agency." Motor Vehicle Mfrs. Ass'n of Am. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983); Consumer Elecs. Ass'n v. FCC, 347 F.3d 291, 303 (D.C.Cir.2003) (applying this holding to FCC decisions). "The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984). Thus, the question for this Court is not how it would interpret the statute, but whether the FCC's interpretation was reasonable.

Plaintiff contends that the FCC's eleven-year-old interpretation was manifestly contrary to the plain meaning of the TCPA and that Staples needed to obtain Plaintiff's "prior express invitation or permission" with respect to the single facsimile advertisement at issue in this case. Even assuming that Plaintiff can somehow divine and articulate the meaning of "prior express invitation or permission" without the benefit of the FCC's guidance, Plaintiff has not met its

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<sup>2</sup> Plaintiff does not -- because it cannot -- suggest that the FCC facsimile rules at issue here were adopted through means less formal than notice and comment rulemaking.

burden of showing that the FCC was manifestly unreasonable in interpreting the TCPA in the way it did.

The FCC's interpretation is entirely consistent with the plain meaning of the word "invitation." According to Webster's, "invitation" may be just as validly construed to be "a formal request" as an "attraction or incentive," an "allurement," or a "provocation." *Random House Webster's College Dictionary*, p. 688. Given these definitions, the FCC's determination that the provision of a facsimile number in the context of an ongoing business relationship qualifies as an "invitation" for the sending of a facsimile advertisement is wholly justified.

It is important to note that the presence of the adjective "express" does not save the phrase "express invitation" from the need for clear administrative guidance. "Express" is merely defined by Webster's as "clearly indicated." *Id.*, at p. 461. Plaintiff is correct in its assertion that in some legal contexts, "express" does mean the opposite of "implied." However, *if a litigant were to present the Court with a pleading or a contract signed "with express invitation," as opposed to "with express permission," the Court would no doubt request clarification as to what this meant.*

In short, the FCC had to clarify the phrase "express invitation," as used in the TCPA. The FCC permissibly construed the statute in light of the legislative intent and in accordance with established principles of statutory construction under its notice and comment rulemaking procedures. See 47 U.S.C. §§ 154(i), 151, 227 ("Other Provisions," following the



Congressional findings (quoting October 28, 1992, Public Law 102-556, Title I, § 102, 106 Stat. 4186)); 5 U.S.C. § 551(4).<sup>3</sup>

The reason the FCC undertook to define these undefined, "problematic" terms in the TCPA is clear. The TCPA is merely a "skeleton of a system [for which] [m]uch of the detail was left to the F.C.C." Charvat v. Dispatch Consumer Servs., 95 Ohio St. 3d 505, 769 N.E.2d 829, 831-34 (Ohio 2002). The reason the FCC interpreted "express invitation" as it did was based on the "well established principle that statutes will be interpreted to avoid constitutional difficulties." Frisby v. Schultz, 487 U.S. 474, 483, 108 S.Ct. 2495 (1988) (string citation omitted). Otherwise, the undefined and open-ended word "invitation" would have given rise to constitutional difficulties in the TCPA, the very statute that the FCC was charged with administering. See Destination Ventures, Ltd. v. F.C.C., 844 F.Supp. 632, 639 (D.Oreg. 1993) (the government's intent to avoid constitutional difficulties was illustrated when the United States Attorney General used the FCC interpretation of "unsolicited advertisement" to defend against constitutional attacks on the TCPA).<sup>4</sup>

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<sup>3</sup> The TCPA is part of the Telecommunications Act of 1934, and subject to the broad powers of the FCC to administer this statute by rule or order 47 U.S.C. §§ 154(i) ("Duties and powers. The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions."); § 151 ("there is hereby created a commission to be known as the 'Federal Communications Commission', which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act."); 5 U.S.C. § 551(4) (Administrative Procedure Act defines "rule" to include what the FCC did here: "'rule' means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy ... or practices bearing on any of the foregoing"); 47 U.S.C. § 227, "Other Provisions," following the Congressional findings (quoting October 28, 1992, Public Law 102-556, Title I, § 102, 106 Stat. 4186) ("Regulations. The Federal Communications Commission shall prescribe regulations to implement the amendments made by this section [adding this section and amending 47 USCS § 152(b)] not later than 9 months after the date of enactment of this Act.")

<sup>4</sup> "Plaintiffs also contend the statute unfairly burdens business relationships that would otherwise welcome unrestricted fax transmissions because it does not permit unsolicited faxes even when the sender and recipient enjoy an established business relationship. The government responds that the TCPA permits unsolicited faxes in

B. In and of itself, provision of a facsimile number constitutes "prior express invitation or permission" to receive facsimile advertisements.

Regardless of whether the FCC's interpretation of the TCPA's facsimile provisions is entitled to deference in general, it is certainly entitled to deference as applied to this particular Plaintiff, which provided its facsimile number to Staples.

Provision of one's telephone number constitutes "express invitation or permission to be called at the number which they have given, absent instructions to the contrary". Schneider v. Susquehanna Radio Corporation, 260 Ga.App. 296, 301 (2003) (citing 7 FCC Rcd 8752, 8769 (31) (1992) ("1992 Report" or "1992 FCC Report"). The FCC's ruling in this regard was based on its interpretation of the same operative terms that are at issue in this case, namely, "prior express invitation or permission":

**If a call is otherwise subject to the prohibitions of § 64.1200 [which includes facsimile advertising], persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary. [Fn]. Hence, telemarketers will not violate our rules by calling a number which was provided as one at which the called party wishes to be reached. However, if a caller's number is "captured" by a Caller ID or an ANI device without notice to the residential telephone subscriber, the caller cannot be considered to have given an invitation or permission to receive autodialer or prerecorded voice message calls. Therefore, calls may be placed to "captured" numbers only if such calls fall under the existing exemptions to the restrictions on autodialer and prerecorded message calls.**

*1992 Report*, 7 FCC Rcd. 8752, 8769 (1992).<sup>5</sup>

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established business relationships because the FCC concluded that a solicitation can be deemed invited or permitted when a prior business relationship exists."

<sup>5</sup> Although this discussion arose in the telemarketing context, the ruling covers all calls subject to the FCC's regulations at 47 C.F.R. § 64.1200, which includes a prohibition on facsimile advertising. 47 C.F.R. § 64.1200 (a)(3).

The FCC's ruling in this regard is clearly supported by the legislative history. House Report No. 102-317, at p. 13 ("The term ["solicitation"] does not apply to calls or messages where the called party has in essence requested the contact by providing the caller with their telephone number for use in normal business communications."). "Solicitation" under the TCPA is defined with reference to the same terms ("prior express invitation or permission") as "unsolicited advertisements" is defined in the context of facsimile advertising. Thus, the willing provision of a facsimile number while patronizing a business also must establish consent to the receipt of facsimile advertisements. Department of Revenue of Ore. v. ACF Industries, Inc., 510 U.S. 332, 342 (1994) ("Identical words used in different parts of the same act are intended to have the same meaning." (quotations omitted)). If Congress intended otherwise, it would have used terms other than "prior express invitation or permission" in the facsimile advertising portions of the TCPA.

Furthermore, the FCC has spoken directly to this issue in the context of facsimile advertising in its 1995 Report. In or about 1995, two companies asked that the FCC change its rules under the TCPA to provide that mere publication or release of a facsimile number such as by capturing the number from the top of a facsimile could constitute prior express invitation or permission. *1995 Report*, 10 FCC Rcd 12391, 12408-12409 (1995), para. 36. The FCC rejected this proposed rule change. Instead, the FCC held, consistent with the congressionally expressed intent, that where a facsimile number is only incidentally released or published (such as in a trade journal or telephone directory), the issue of consent is still to be determined on a case-by-case basis:

**[G]iven the variety of circumstances in which such numbers may be distributed (business cards, advertisements, directory listings, trade journals, or by membership in an association), we believe it is appropriate to treat the issue of consent in any complaint regarding unsolicited facsimile advertisements on a case-by-case basis.**

*1995 FCC Report and Order*, 10 FCC Rcd 12391, 12408-12409 (1995), para. 37. In July 2003, however, the FCC noted:

**Any customer who provides contact information when patronizing a business is providing express permission to be contacted by that business, including via facsimile advertising.**

*July 2003 FCC Report*, FCC LEXIS 3673, 18 FCC Rcd 14014 at para. 16 (the FCC was acknowledging commentators who had noted that this was the state of the law prior to the July 2003 change) (emphasis added).

As to the circumstances in this case, Plaintiff's provision of a facsimile number to Staples in the course of patronizing Staples constitutes "prior express invitation or permission" under the TCPA to be contacted by Staples, including via facsimile. Plaintiff's claims are therefore barred as a matter of law

**C. Congressional failure to revise or repeal the FCC's interpretation of the TCPA is "persuasive evidence" that the FCC's eleven year old interpretation was meant by Congress.**

Congress revisited the TCPA in March 2003 in enacting the "Do-Not-Call Implementation Act." Public Law 108-10. On March 11, 2003, President Bush signed this bill into law. The Act specifically referenced the 1992 rules and regulations issued by the FCC under the TCPA, and ordered the FCC to complete its rulemaking proceedings under the TCPA:

**Not later than 180 days after the date of enactment of this Act, the Federal Communications Commission shall issue a final rule pursuant to the rulemaking proceeding that it began on September 18, 1992, under the Telephone Consumer Protection Act (47 U.S.C. 227 et seq.).**

Public Law 108-10 (2003). See 15 U.S.C. § 6101, notes following statute. The Act further provided that the FCC was to submit to Congress “a review of the enforcement proceedings ... under the Telephone Consumer Protection Act (47 U.S.C. 227 et seq.) ...” Public Law 108-10, § (b)(6). Despite revisiting the TCPA and specifically referencing the FCC’s 1992 Report, Congress did nothing to restrict the FCC’s authority under the TCPA or to disapprove of the FCC’s previous findings regarding facsimile advertising.

“It is well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the ‘congressional failure to revise or repeal the agency’s interpretation is persuasive evidence that the interpretation is the one intended by Congress.’” Commodity Futures Trading Comm’n. v. Schor, 478 U.S. 833, 846, 106 S. Ct. 3245, 92 L. Ed. 2d 675 (1986) (*quoting* NLRB v. Bell Aerospace Co., 416 U.S. 267, 274-75 (1974) (footnotes omitted)). Thus, the FCC’s longstanding interpretation and assertion of authority to define “prior express invitation or permission” must be presumed correct.

**D. In 2003, the FCC properly changed its rules under the TCPA prospectively so as to take account of legitimate reliance over the last eleven years on their prior interpretation of the facsimile provisions.**

In July 2003, the FCC solicited commentary through its notice and comment rulemaking authority and *prospectively* changed its rules to require a signed writing evidencing

consent to receive facsimile advertisements.<sup>6</sup> It made it clear that persons and entities relying on their previous rulings were in compliance with FCC rules under the TCPA. FCC July 2003 Report and Order, 18 FCC Rcd 14014 at p. 303, n. 699 (**"We emphasize that, prior to the effectuation of rules contained herein, companies that transmitted facsimile advertisements to customers with whom they had established business relationships were in compliance with the Commission's existing rules."**) (emphasis added).<sup>7</sup>

Given the longstanding industry-wide reliance on the FCC's interpretation of the TCPA under its rules, the FCC's prospective application of this rule change was correct under constitutional notions of fairness and due process.<sup>8</sup> In fact, the FCC could not have changed its interpretation retroactively or it would have been a reversible "abuse of discretion." Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 742 (1996) ("Sudden and unexplained [agency] change [Cit.] or change that does not take account of legitimate reliance on prior interpretation [Cit.] may be 'arbitrary, capricious [or] an abuse of discretion.'"). This is further consistent with previous pronouncements of the Court of Appeals in this state, which has itself recently applied

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<sup>6</sup> This change is actually contrary to Congress's expressed intent. See House Report 102-317, at p. 13 ("The Committee did not attempt to define precisely the form in which express permission or invitation must be given, but did not see a compelling need for such consent to be in written form.").

<sup>7</sup> The rules, prior to the July 2003 revision, used the same operative language as the TCPA, "prior express invitation or permission." Therefore, compliance with the FCC rules establishes compliance with the TCPA. Compare 47 C.F.R. § 64.1200(a)(3) with 47 U.S.C. § 227.

<sup>8</sup> Train v. Natural Resources Defense Council, Inc., 421 U.S. 60, 75, 87 (1975) ("We therefore conclude that the Agency's interpretation of §§ 110 (a)(3) and 110 (f) was "correct," to the extent that it can be said with complete assurance that any particular interpretation of a complex statute such as this is the "correct" one. Given this conclusion, as well as the facts that the Agency is charged with administration of the Act, and that *there has undoubtedly been reliance upon its interpretation by the States and other parties affected by the Act, we have no doubt whatever that its construction was sufficiently reasonable to preclude the Court of Appeals from substituting its judgment for that of the Agency.* Udall v. Tallman, 380 U.S. 1, 16-18 (1965); McLaren v. Fleischer, 256 U.S. 477, 480-481 (1921).") (emphasis added); Davis v. United States, 495 U.S. 472, 484 (1990) ("[W]e give an agency's interpretations and practices considerable weight where they involve the contemporaneous construction of a statute and where they have been in long use.").

new principles prospectively. See Ketchup v. Howard, 247 Ga.App. 54, 55 (2000) (reversing its prior conclusion that informed consent doctrine did not apply in Georgia, and applying this ruling only prospectively).

**E. This Court lacks subject matter jurisdiction over challenges to the FCC's authority to issue rules and orders. The exclusive method for challenging the FCC's promulgation of rules and orders under the TCPA is to appeal to the United States Court of Appeals.**

Plaintiff contends that the FCC got it wrong for the last eleven years. Plaintiff essentially desires to challenge two FCC rules and orders: (1) the rule that persons with established business relationships are deemed to have consented to receipt of facsimile advertisements, and (2) the rule that persons who relied on the FCC's eleven-year old interpretation are deemed to have complied with the FCC's rules under the TCPA.

Regardless of whether the FCC was right or wrong, this Court cannot ignore the Reports and Orders of the FCC. The exclusive method for challenging the FCC's rules and orders under the Telecommunications Act of 1934 (of which the TCPA is a part) is to petition the FCC and then to appeal to the proper United States Court of Appeals. 47 U.S.C. § 402 (parties must appeal agency orders and reports in federal court), 47 U.S.C. § 405 (parties must first petition within thirty days for reconsideration before appealing agency action); 28 U.S.C. § 2342 (appeals procedure); 5 U.S.C. § 706 (only court with authority to review agency action can set aside or nullify agency action). See also footnote 4, *infra*. Were the rule otherwise, the FCC would have no authority, as some courts could choose to ignore it and others could choose to respect it.

This Court therefore lacks subject matter jurisdiction to overturn these rules and must abide by the Reports and Orders of the FCC unless nullified by the proper authority.

**F. At the very least, even if the FCC got it wrong for the last eleven years, where Plaintiff has provided its facsimile number in the course of patronizing Staples, there is a genuine issue of material fact as to whether the advertisement received from Staples was "unsolicited."**

If Defendants' Motion for Summary Judgment is not granted, then Plaintiff's Cross-Motion for Summary Judgment should likewise be denied. The Plaintiff gave its facsimile number to Staples while doing business with Staples at a time when the FCC deemed the existence of an established business relationship to be consent to receive facsimile advertisements. A jury may conclude in this context that the advertisement was not "unsolicited" and that Plaintiff thereby provided his "prior express invitation or permission" to receive advertisements from Staples. Thus, Plaintiff's Cross-Motion should be denied.

**G. Quick Link, which is not the originator of the content of the facsimile advertisement at issue, must be dismissed.**

The FCC held in its 1995 and 1997 Orders that the "sender" of a facsimile advertisement, for purposes of compliance with the TCPA, is the "creator of the content of the message." *1995 TCPA Reconsideration Order, 10 FCC Rcd at 12407, para. 35* (holding that "the entity or entities on whose behalf facsimiles are transmitted are ultimately liable for compliance with the rule banning unsolicited facsimile advertisements, and that fax broadcasters are not liable for compliance with the rule."); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CC Docket No. 92-90, Order on Further Reconsideration, 12 FCC Rcd 4609, 4613, para. 6 (1997) (1997 TCPA Reconsideration Order)* ("We clarify that the sender of a facsimile message is the creator of the content of the



message.”). Plaintiff has not questioned this nor presented contrary authority in his responsive brief, and therefore, Plaintiff’s claims against Quick Link must be dismissed.

**H. The inadmissible cases presented by Plaintiff merely consider only one canon of statutory construction, and improperly consider this canon dispositive.**

Most of the caselaw attached to Plaintiff’s opposition to Defendants’ Motion for Summary Judgment consists of inadmissible summaries of opinions from a website called tcpalaw.com. This site is run by a lawyer in St. Louis who brings TCPA lawsuits. The headnotes are presented so as to appear to be in the same format of Lexis or Westlaw, but tcpalaw.com is not a recognized official publication. Defendants object to Plaintiff’s submission, and the Court’s consideration, of this “authority.”

Even if the Court considers this authority, it should note that not one of these cases addresses the situation presented here – where a person has willingly provided its facsimile number. In disregarding the FCC’s interpretations of the TCPA under its Reports and Orders, these decisions improperly consider only one statutory rule of construction in their determinations that the FCC got it wrong. They do not consider the effect of the FCC’s July 2003 ruling deeming persons relying on the FCC to be in compliance with the TCPA and rules thereunder. Nor do these cases consider the issues of longstanding reliance on the FCC rules and due process. Nor do these cases consider the threshold issue of subject matter jurisdiction.

The cases cited by Plaintiff are decided solely under statutory canons advanced by plaintiffs’ counsel. However, “Canons of construction need not be conclusive and are often countered, of course, by some maxim pointing in a different direction.” Circuit City Stores v. Adams, 532 U.S. 105, 115 (2001). Other canons clearly point in a different direction as to the

meaning of the TCPA, such as the principle that longstanding agency interpretations of statutes are presumed correct, especially where other courts have embraced those interpretations and where Congress has revisited that statute without any changes whatsoever.

**V. CONCLUSION**

WHEREFORE, for the foregoing reasons, and for the reasons stated in Staples' initial brief, Plaintiff's claims under the Telephone Consumer Protection Act of 1991 must be dismissed, Defendant's Motion for Summary Judgment must be granted and Plaintiff's Cross-Motion for Summary Judgment must be denied.

Respectfully Submitted,  
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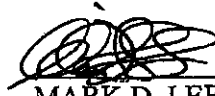
CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for the opposing party in the foregoing matter with a copy of the foregoing document by depositing same with adequate postage thereon in the United States Mail addressed as follows:

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This 10<sup>th</sup> day of February, 2004.



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## EXHIBIT 8

2/16 72097-3

SUPERIOR COURT OF RICHMOND COUNTY  
STATE OF GEORGIA

MATTISON R. VERDERY, C.P.A, P.C.,	)	
individually and on behalf of all persons and	)	
entities similarly situated,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action File No.
	)	<u>2003-RCCV-728</u>
	)	
STAPLES, INC. and QUICK LINK	)	
INFORMATION SERVICES, LLC,	)	
	)	
Defendants.	)	

**PLAINTIFFS' BRIEF IN REPLY TO DEFENDANTS' RESPONSE  
TO PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT**

In response to plaintiff's cross-motion for summary,<sup>1</sup> the defendants rehash the same arguments made in their earlier brief and oral argument to the Court.<sup>2</sup> The defendants' contentions are no less misguided and equally as unpersuasive now as when originally presented.

**A. Plaintiff's claims arise under federal statute, not administrative rulings or orders.**

As noted by the Court at oral argument, the plaintiff's claims emanate from the TCPA. The plaintiff is neither challenging nor relying upon any FCC rule or order. Thus, the

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<sup>1</sup> Reply Brief of Defendants Staples, Inc. and Quick Link Information Services, LLC in Support of Motion for Summary Judgment and in Response to Plaintiff's Cross-Motion for Summary Judgment ("Defendants' Reply Brief").

<sup>2</sup> The defendants now focus almost exclusively on the purported "established business relationship" exemption to the TCPA's junk fax ban. In doing so, they have abandoned any constitutional attack on the TCPA, the contention that the TCPA is preempted by Georgia's junk fax ban, and many other arguments initially raised in support of summary judgment.

defendants' considerable time spent trying to weave FCC commentary into law is misplaced.<sup>3</sup> Likewise, the defendants' argument that this Court lacks subject matter jurisdiction because plaintiff's claims constitute a challenge to FCC authority is markedly off-point.<sup>4</sup>

**B. There is no established business relationship exemption for junk faxing.**

The plain language of the TCPA contains *no exemption* for the transmission of unsolicited fax advertisements. Congress considered and rejected such an exemption, and the FCC has no authority to retroactively alter Congress' clear intent evidenced by the final statute.<sup>5</sup> Any attempt, whether by the FCC or a court, to create an exemption where none exists in the statute would be *void ab initio*.

**C. Providing a fax number does not constitute "prior express invitation or permission" to receive junk faxes.**

The defendants continue to press the assertion that the plaintiff consented to receiving junk faxes by giving its fax number to Staples.<sup>6</sup> The FCC has rejected this notion outright,<sup>7</sup> and it is undeserving of attention here. The phrase "express invitation or permission" means just what it says—an overt request or authorization to send fax advertisements. There is no ambiguity—the statute leaves no room for "implied" or "deemed" permission.

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<sup>3</sup> Defendants' Reply Brief, pp. 1-8.

<sup>4</sup> Defendants' Reply Brief, pp. 14-15.

<sup>5</sup> Plaintiff's Brief in Opposition to Defendants' Motion for Summary Judgment and in Support of Plaintiff's Cross-Motion for Partial Summary Judgment ("Plaintiff's Brief"), pp. 4-9.

<sup>6</sup> Defendants' Reply Brief, pp. 9-11.

<sup>7</sup> Plaintiff's Brief, p. 15 n. 19.

Notably, the defendants attempt to mislead the Court by citing a Georgia case<sup>8</sup> about pre-recorded telephone messages and FCC commentary about voice telephone solicitations.<sup>9</sup> As the Court knows, the TCPA has distinct, independent rules for pre-recorded voice messages, telephone solicitations and junk faxes; they are *not* interchangeable.<sup>10</sup> Cases and agency commentary regarding telephone solicitations have no relevance to the TCPA's junk fax ban.

**D. The defendants fail to rebut any of the material facts entitling plaintiff to summary judgment.**

The plaintiff has presented undisputed evidence that the defendants transmitted a fax advertisement to the plaintiff without first obtaining plaintiff's prior express invitation or permission.<sup>11</sup> Uncontested, such evidence establishes liability under the TCPA. In response, the defendants have failed to produce evidence to rebut any element of plaintiff's prima facie case.<sup>12</sup> If the Court denies summary judgment to the defendants, thereby rejecting defendants' affirmative defenses, the plaintiff is entitled to judgment as a matter of law.<sup>13</sup>

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<sup>8</sup> Schneider v. Sesquehanna Radio Corp., 260 Ga. App. 296 (2003).

<sup>9</sup> 7 FCC Rcd. 8752, 8769 (1992).

<sup>10</sup> 47 U.S.C. 227. See also Plaintiff's Brief, pp. 4-5.

<sup>11</sup> Plaintiff's Theory of Recovery and Statement of Material Facts as to Which No Genuine Issues Exist to be Tried, ¶¶ 1-2, 12-13.

<sup>12</sup> The defendants have presented no evidence, by affidavit or otherwise, to show that a genuine issue of material fact remains to be tried. See Defendants' Reply Brief.

<sup>13</sup> Meade v. Heimanson, 239 Ga. 177, 236 S.E.2d 357 (1977) (after moving party presents prima facie case, responding party "must come forward with rebuttal evidence *at that time*, or suffer judgment against him") (emphasis in original).

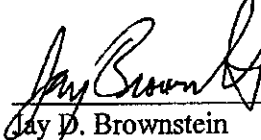
Respectfully submitted this 16<sup>th</sup> day of February, 2004.

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**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a copy of the foregoing PLAINTIFFS' BRIEF  
IN REPLY TO DEFENDANTS' RESPONSE TO PLAINTIFF'S CROSS-MOTION FOR  
SUMMARY JUDGMENT by depositing the same in the United States mail with proper postage  
affixed thereto and addressed as follows:

Robert B. Hocutt, Esq.  
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This 16<sup>th</sup> day of February, 2004.

  
\_\_\_\_\_  
Jay D. Brownstein  
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